FILE COPY

FILED

MAY 29 1973

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1592

CAROLEE BIDDY,
PETITIONER,

v.

STATE OF MISSISSIPPI,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

F. LEE BAILEY
MARK J. KADISH
JOHN R. TRUMAN
One Center Plaza
Boston, Massachusetts

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reason for Granting the Writ	11
Explication or Reaffirmation of *Miranda* v. *Arizona* by This Court Is Necessary To Prevent Courts From Vitiating *Miranda* Either by Extending a Waiver of *Miranda* Rights Over a Period of Twelve Days During Which the Defendant Is Not in Custody, Even Where an Attorney Is Requested, or by Holding That No Attorney Is Requested Where He Is in Fact Requested With the Knowledge and on Behalf of the Defendant	11
Conclusion	22
Appendix A	23
Appendix B	27
Appendix C	42

Table of Citations

Cases

Brown v. *State*, 252 A.2d 272 (Md. 1969)	17
Brunson v. *State*, 264 So.2nd 817 (1972)	22
Commonwealth v. *Bennett*, 282 A.2d 276 (Pa. 1971)	17
Commonwealth v. *Hoss*, 283 A.2d 58 (Pa. 1971)	17
Commonwealth v. *McKenna*, 244 N.E.2d 560 (1969)	20
Franklin v. *State*, 252 A.2d 487 (Md. 1969)	18
Frazier v. *Culp.*, 394 U.S. 731, 738 (1969)	19
Frazier v. *U. S.*, 419 F.2d 1161 (D.C. Cir. 1969)	18

Page

Maguire v. *U. S.*, 396 F.2d 327 (9th Cir. 1968) 12, 17
Massiah v. *U. S.*, 377 U.S. 201 (1964) 20
Miranda v. *Arizona*, 384 U.S. 436 (1966) .. 3, 11, 16, 17, 18
Nettles v. *State*, 248 So.2d 259 (Fla. 1971) 17
People v. *Arthur*, 22 N.Y.2d 325, 329 (1968) 21
People v. *Bynum*, 483 P.2d 1193 (Cal. 1971) 17
People v. *Donovan*, 243 N.Y.S.2d 841 (1964) 20
People v. *Gunner*, 257 N.Y.S.2d 924 (1965) 20
People v. *Hill*, 58 Cal. Rptr. 340, 426 P.2d 908 (1967) . 12
People v. *Ireland*, 450 P.2d 580 (Cal. 1969) 19
People v. *Paulin*, 308 N.Y.S.2d 883, aff'd. 255 N.E.2d 164 (1969) 19
People v. *Pervin*, 55 Cal. R. 847 (1967) 19
People v. *Randall*, 464 P.2d 114 (Cal. 1970) 19
People v. *Schenck*, 101 Cal. R. 75 (1972) 18
People v. *Vella*, 287 N.Y.S.2d 369 (1967) 20
People v. *Zimmer*, 68 Misc. 2d 1067, 329 N.Y.S.2d 17, 21 (Co. Ct. 1972) 13
Petree v. *State*, 451 S.W.2d 461 (Ark. 1970) 21
Pierce v. *State*, 451 S.W.2d 219 (Ark. 1970) 19
Sossamon v. *State*, 432 S.W.2d 469 (Ark. 1968) 12
State v. *Davis*, 157 N.W.2d 907 (Iowa 1968) 17
State v. *Graves*, 259 La. 526, 250 So.2d 727 (1971) . 12
State v. *Harrison*, 251 N.E.2d 521 (Ohio 1969) 21
State v. *Magee*, 245 A.2d 339 (N.J. 1968) 17, 19
State v. *Rowe*, 468 P.2d 1000 (Wash. 1970) 12
State v. *Word*, 456 P.2d 210 (N. Mex. 1969) 21
Stevens v. *Marks*, 383 U.S. 234 (1965) 18
Taylor v. *Elliot*, 458 F.2d 979 (5th Cir. 1972) 20
United States v. *Crisp*, 435 F.2d 354 (7th Cir. 1970) . 19
United States v. *Four Star*, 428 F.2d 1406 (9th Cir. 1970) 20
U. S. ex rel. Magoon v. *Reincki*, 416 F.2d 69 (2d Cir. 1969) 20

Page

United States v. *Priest,* 409 F.2d 491, 493 (5th Cir. 1969) 20

United States v. *Smith,* 379 F.2d 628, 633 (7th Cir. 1967) 20

United States v. *Thomas,* 474 F.2d 110, 112 (10th Cir. 1973) 13

United States v. *Wedra,* 343 F. Supp. 1183 (S.D.N.Y. 1972) 20

Wakeman v. *State,* 237 So.2d 61 (Fla. 1970) 21

Other Authorities

Canon 7 of the A.B.A. Code of Professional Responsibility, Disciplinary Rule 7-104(A)(1) 13

George, Jr. "Defending Criminal Cases" (PLI 1969) p. 161 17

2 Han. Civ. Rts. - Civ. Lib. L.R. 144, 153 (1966) 18

42 Notre Dame Lawyer 479, 489 18

Waiver of Rights in Police Interrogations, 36 Chicago L.R. 413, 419 (1969) 19

In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. ——

CAROLEE BIDDY,
PETITIONER,

v.

STATE OF MISSISSIPPI,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

The petitioner, Carolee Biddy, respectfully prays that a rit of certiorari issue to review the judgment and opinions f the Supreme Court of the State of Mississippi.

Opinions Below

The Mississippi Supreme Court's unreported opinions on ppeal and or rehearing appear in Appendix A & B erein, pages 23 & 38.

Jurisdiction

The Mississippi Supreme Court affirmed the conviction on January 8, 1973, and denied a petition for rehearing on February 26, 1973. This Court's jurisdiction is invoked under 28 U.S.C., Sec. 1257 (3).

Question Presented

Whether *Miranda* is violated when police induce incriminating statements after an attorney (obtained for petitioner by her husband) left the police station because of illness, and before the arrival of a second attorney known by police to be on his way to see petitioner.

Constitutional Provisions Involved

Fifth Amendment, U. S. Constitution:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

Sixth Amendment, U. S. Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Fourteenth Amendment, U. S. Constitution:

> Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Statement of the Case

The first trial of petitioner for murder of her six year old stepdaughter, Mona, resulted in a mistrial. At the second trial in the Circuit Court of Jackson County, Mississippi, petitioner was, on September 5, 1971, convicted by a jury of manslaughter and sentenced to a term of twenty years in the state penitentiary. The Mississippi Supreme Court affirmed this conviction (Appendix A) and denied a petition for rehearing (Appendix B).

During the first trial an evidentiary hearing was held on May 26, 1971, outside the presence of the jury, regarding the admissibility under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), of statements made by petitioner on December 27 and 28, 1970, to law enforcement officers (see Appendix C). By stipulation this evidentiary hearing and "the previous objections made by counsel for the defendant" were made a part of the record of the second trial, whereupon defense counsel orally renewed his motion to suppress the petitioner's statements, declaring that "[t]he defendant objects to ... the admissibility of the statement in its entirety ..." (Tr. 53-54). The trial judge denied this motion, stating, "I will rule that the *Miranda* requirements have been met ... and that the statements are admissible" (Tr. 55). In her motion for a new trial petitioner alleged that "[t]he Court erred in allowing the statement made on December 27, 1970, to be introduced in evidence, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States" (Tr. 1074). On appeal to the Mississippi Supreme Court petitioner contended that "[t]he two oral statements made by appellant were inadmissible, under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States" and *Miranda* v. *Arizona, supra,* (Brief of Appellant at 14-25).

On December 3, 1970, petitioner reported the disappear-

ance of her six-year-old mentally retarded stepdaughter, Mona (Tr. 62, 73, 82, 278). Jackson Detective Lieutenants Reeves and Price first talked with petitioner at home on December 4 and did so "practically every day" thereafter (Tr. 278, 301, 349). On December 8, 1970, Mona Biddy was found dead at the Barnett Reservoir, about thirteen miles from petitioner's home (Tr. 294, 300).

On December 15, 1970, the detectives called petitioner to police headquarters to identify an article of clothing. They honored petitioner's request to have her husband present (Tr. 279), but then the two detectives and the prosecuting attorney took petitioner to a room by herself and asked her to recite the details of the disappearance, which she did. Petitioner was then advised of her *Miranda* rights by Lt. Price and questioned as to her involvement, which she denied and questioning ceased (Tr. 280-282, 304, 339-341, 360-363). Police then told petitioner's husband "that we thought that Mrs. Biddy was involved in the disappearance of Mona Biddy" (Tr. 341). Mr. Biddy was not questioned about his involvement in Mona's disappearance because police had focused their suspicions solely on petitioner by that time (Tr. 304).

The same day petitioner was taken to the highway patrol headquarters where she was again advised of her *Miranda* rights (Tr. 368). That same evening Mr. Biddy asked the detectives to come to his home, where they encountered Mr. Charles Wright, whom they "knew was a lawyer... a friend of the family, and represented Mr. Biddy's firm as a lawyer . . ." Though Mr. Biddy wanted the detectives to talk to petitioner, attorney Wright prevented this, saying, "this is not the time and place for that," and the detectives left (Tr. 283-284, 308).

The next night, December 16, 1970, the two detectives responded to a call from the Biddy home, where petitioner told them of escaping in her back yard from an unknown

male attacker who stabbed her in the hip (Tr. 284-285).

The night of December 26, 1970, Lt. Reeves responded to another call from the Biddy home reporting that their two-and-a-half year old daughter, Candice, had been kidnapped and found in the back yard (Tr. 285-286).

Lt. Reeves testified that about eight o'clock the morning of December 27, 1970, the two detectives met with J. Mal Sims, Jr., Mr. Biddy's business partner, solely "to get his opinion of what was going on," that Sims said Biddy's father had called Sims, expressing a desire to talk to Lt. Reeves, and that Reeves agreed to and did call Biddy's father (Tr. 308, 310). But Sims testified that the reason the two detectives gave for meeting Sims

> was to ask me if I'd contact Ted Biddy and talk to him about having his wife, let's say 'removed' from the house, so far as we all agreed that she had obviously, or most probably, had hurt herself, and could potentially someone else,... and they would like for me to talk to him, and get him to—I think the way it was put, *to get him from between the police and Mrs. Biddy,* and they wanted me to talk to him about trying to have her placed under some medical care... (Tr. 407-408. Emphasis added).

Sims told the detectives he would do what he could and they all agreed Sims would talk to Mr. Biddy's father (Tr. 408). Within two hours Sims called Mr. Biddy's father, which Sims dutifully reported to Lt. Reeves; Sims gave Lt. Reeves Biddy's father's phone number, suggesting that Reeves call him himself (Tr. 383, 408-409).

Within an hour Lt. Reeves did call Biddy's father, informing him that though petitioner and her husband were planning a week's visit with Biddy's father, they would "probably be detained" for further questioning of peti-

tioner. According to Biddy's father, Lt. Reeves stated that this was a "dangerous situation" akin to "mass murders and suicides" and that "this girl has got to have psychiatric care, either voluntary or compulsory" (Tr. 310-311, 383-385).

The two detectives had secured Mr. Biddy's promise to notify them before leaving for their visit with Biddy's father (Tr. 288, 309, 389). The morning of December 27, 1970, Biddy notified the detectives they were ready to leave. The detectives drove to the Biddy home and informed them that "it is official... the [police] Chief had ordered them to take her [petitioner] downtown" (Tr. 288-289, 389-390). Biddy's business partner Sims, who had been earlier told by police that they were going to take the Biddys downtown, testified that

> at the time that Mr. and Mrs. Biddy came from the house, they stopped and asked me—that is Mr. Biddy asked me if I would contact Mr. Charles Wright, who was our corporate attorney, and ask him to please get down to the jail right away, that he would like to have him present (Tr. 410).

Biddy also testified that he and petitioner walked over to Sims and Biddy "asked Mr. Sims to call my attorney, Mr. Charles Wright" (Tr. 391). Detective Reeves and Price knew "that Mr. Mal Sims was going to call tgeir [sic] lawyer for them" (Tr. 316).

The detectives followed the Biddys to the police station (Tr. 315, 391), where Mr. Biddy reminded them that he had contacted attorney Wright to come and be with him and the petitioner and that he did not want any questions put to her until the attorney arrived and that Biddy also wanted to be present when petitioner was questioned (Tr. 289, 392).

Detectives then placed the Biddys in separate interro-

gation rooms, first talking privately to Mr. Biddy for "an hour and a half trying to poison my mind against her" (Tr. 317, 393, 344). They told him that the clothing store denied petitioner's assertion that she modeled for it, raising the question of the actual source of the clothes she brought home supposedly in connection with her modeling job (Tr. 290, 319, 393).

Detectives informed Mr. Biddy that his wife was not going to a health studio every week as she claimed, leaving the inference that "[s]he was going somewhere [else]" (Tr. 290, 321, 354, 393).

They advised Biddy that "our investigation showed that it [the attack petitioner claimed on December 16, 1970] could not have happened that way" but was "a fake," and that the stabbing was "self-inflicted" (Tr. 290, 320, 354, 393).

They also told Biddy that the kidnapping of Candice the day before was a "hoax" (Tr. 290, 321, 354, 394).

The detectives succeeded in convincing Biddy that petitioner had probably faked these last two incidents (Tr. 290, 394). They then argued that petitioner was implicated in Mona's disappearance or death (Tr. 394), in an acknowledged effort to enlist his help in solving the case by talking with petitioner (Tr. 354-355).

The true significance of the above efforts to discredit petitioner in her husband's eyes, particularly as to the modeling and health spa visits, can be appreciated only in light of the detectives' overall attempt to make Mr. Biddy believe that there existed a clandestine relationship between petitioner and her ex-husband, Roy Dunn (Tr. 392-393). They mentioned that Dunn had been excluded from seeing petitioner when hospitalized for "nerves" (Tr. 392), and that Dunn "was calling out at the house regularly, checking on the children" (Tr. 353).

The detectives said they had three witnesses who had

seen a nightgowned woman matching petitioner's description walking in the marina area (Tr. 395). They also told Mr. Biddy that they felt that petitioner was "mentally ill," requiring commitment either by Mr. Biddy or the police (Tr. 322-323, 395).

Mr. Biddy testified that at this point he asked to speak to his wife alone but the detectives said they would have to be present and brought petitioner in (Tr. 323, 395). Mr. Biddy then began repeating to his wife what the detectives had been telling him about their investigation. But before the detectives took over the questioning and before petitioner made the admissions which are the primary subject of this Petition, the Biddys' attorney, Charles Wright, appeared at the police station (Tr. 323-324, 346, 396-400).

As the Biddys had left for the police station, Mr. Biddy's business partner Mr. Sims was asked to call attorney Charles Wright to come to the station. Mr. Sims had gone to the nearest pay phone and was told by Mrs. Wright "that Charles was ill, and I asked her if I couldn't speak with him anyway, and she got him..." (Tr. 410-411).

Lt. Reeves testified that:

> before we had very much to say [to petitioner], the phone rang, and my office told me that Mr. Charles Wright was downstairs and would like to talk to us.
>
> I immediately went downstairs and met Mr. Wright, and brought him up to the third floor, and he said he'd like to talk to Mr. Biddy. I went into the room and told Mr. Biddy... and took him out to Mr. Wright, and they conferred (Tr. 290).

Mr. Biddy testified that:

> I went with Mr. Reeves and saw Charles Wright.
>
> He was sick. He apparently had the flu. He couldn't

> talk, he had to hold his troath [sic] to talk. I told him what they were telling me, and I felt that we needed an attorney there to advise her of her rights, and that— 'please come in'.
>
> ... He told me he was sick, he couldn't even talk. He said 'I'll call another lawyer. It'll be John Poole, and he will come'. (Tr. 398)

According to Lt. Price,

> he [attorney Wright] stated that he had a fever, and that he was going to get another lawyer to come up there for him.
>
> Q. Then you knew as he was leaving, another lawyer was on his way up there, did you not?
>
> A. Yes sir... (Tr. 325).
>
> *While they* [Mr. Biddy and attorney Wright] *were gone*... I told her [petitioner] that we would like to ask her some questions, and I said 'do you understand your rights? You have been advised of your rights [twelve days] before.'
>
> [A]nd she said, yes, she understood them. (Tr. 290-291. Emphasis added.).

After attorney Wright left, Mr. Biddy resumed questioning his wife, who admitted not modeling and faking the stabbing and kidnapping incidents. Then, without giving petitioner the warnings required by *Miranda*, and without mentioning that any attorney was on his way (Tr. 334-336), Lt. Reeves took over the questioning, telling petitioner that Mona could not come back and that petitioner was sick and would never get better. Mr. Biddy testified that the detectives repeatedly urged, "[i]f it was an accident, tell us about it, and there won't be any charges." Lt. Price admitted only to mentioning the possi-

bility that it was an accident. (Tr. 291-292, 331-332, 400-401). Then petitioner made the admissions which are the primary subject of this Petition. Petitioner said that the night of December 2, 1970, Mona had drunk some "Liquid Plumr." She called a doctor who said that if Mona's mouth were not burned, she was not seriously hurt. Petitioner put Mona to bed, found her dead two hours later, panicked and drove her to the reservoir (Tr. 292-294. 434-435; Appendix C).

Lt. Reeves asked petitioner to sign a typed version of this statement so that a record would be preserved for their files should something happen to him or Lt. Price. At Reeves' request Mr. Biddy read petitioner her *Miranda* rights and Reeves began typing the statement. Then attorney Poole arrived and, after speaking with Mr. and Mrs. Biddy, informed the detectives that he did not want petitioner to sign any statements. Petitioner was then charged with murder. Telling petitioner he would see her tomorrow, attorney Poole left. (Tr. 294-296, 299, 334, 346, 435, 401).

Petitioner, who had slept no more than two hours the night before, had been kept in a small room while the detectives spoke with her husband (Tr. 318, 388, 396). The detectives knew that petitioner was a high school graduate (Tr. 341, 402), with a history of "mental problems," having undergone four weeks of shock treatment at an institution whose psychiatrist recommended a legal abortion because of these problems (Tr. 313, 465). Her treatment for emotional problems over the three weeks preceding December 27, 1970, by four different doctors included prescription of tranquilizers (Tr. 386-388). Petitioner, whose questioning on December 15 was terminated because she was crying (Tr. 341, 364), was described by her husband as being in a dazed, hysterical state of shock during questioning on December 27, and by a detective

as crying sufficiently to make her eyes swollen (Tr. 333, 396-397, 400, 403).

Shortly after eight o'clock the next morning, December 28, 1970, Lt. Reeves, without the knowledge of petitioner's attorney, knowing that petitioner's attorney was going to but had not yet returned that morning to see petitioner, and without informing petitioner of her *Miranda* rights, asked petitioner whether, though she did not have to, she would show police where she had put Mona's body. Lt. Reeves testified that he assured petitioner that no one could get her out of jail then but that she had "a fine lawyer . . . the last case I was on where Mr. Poole was the defense attorney, his client got forty-five years." Petitioner asked why attorney Poole had not spent more time talking with her yesterday, and Lt. Reeves responded that attorney Poole was more interested in watching a football game, or words to that effect (Tr. 326-327, 379-380). Petitioner consented to Lt. Reeves' request and Lt. Reeves, Lt. Price and a policewoman accompanied petitioner as she reconstructed her route to the reservoir and located an area which "looks like the place" where she had left the body. Then petitioner asked "is this the place?" Lt. Reeves said it was. They took petitioner back to the police station instead of to jail because they knew attorney Poole was coming to see her that morning. As soon as they returned attorney Poole in fact came to talk with petitioner (Tr. 296-299, 326-327, 333-337, 347-348, 376-381).

Petitioner has consistently denied killing Mona Biddy. (Tr. 337, 467).

Reason for Granting the Writ

EXPLICATION OR REAFFIRMATION OF *Miranda* v. *Arizona* BY THIS COURT IS NECESSARY TO PREVENT COURTS FROM VITIATING *Miranda* EITHER BY EXTENDING A WAIVER OF *Miranda* RIGHTS OVER A PERIOD OF TWELVE DAYS DURING

WHICH THE DEFENDANT IS NOT IN CUSTODY, EVEN WHERE AN ATTORNEY IS REQUESTED, OR BY HOLDING THAT NO ATTORNEY IS REQUESTED WHERE HE IS IN FACT REQUESTED WITH THE KNOWLEDGE AND ON BEHALF OF THE DEFENDANT.

In affirming petitioner's conviction, the Mississippi Supreme Court disposed of the *Miranda* issue with the following three sentences of legal analysis:

> It is perfectly clear to us that Mrs. Biddy thoroughly understood her rights and that she had intelligently waived them, not once but twice in writing, and also several times orally. Even on December 27th, immediately before her statements she acknowledged that she understood her rights. There are no magic words that law officers must meticulously repeat each time they question a person. (Appendix A, p. 32)

In support of its decision the Court cited *Maguire* v. *United States*, 396 F.2d 327 (9th Cir. 1968); *Sossamon* v. *State*, 432 S.W.2d 469 (Ark. 1968); and *State* v. *Rowe*, 468 P.2d 1000 (Wash. 1970), all involving statements made within three, one and two days, respectively, of a *Miranda* warning, where the defendant was in continuous custody and no attorney was requested. The Court also cited *People* v. *Hill*, 58 Cal. Rptr. 340, 426 P.2d 908 (1967), which declined to apply *Miranda* to a trial beginning before *Miranda*, and *State* v. *Graves*, 259 La. 526, 250 So.2d 727 (1971), wherein there were two separate dissenting opinions even though the statement was exculpatory and repeated on the witness stand by the defendant. The Mississippi Supreme Court did not discuss the fact that petitioner here had last been warned of her *Miranda* rights twelve days before she gave her December 27, 1970, statement. Nor did the Court address itself to the distinction between understanding a right and waiving it:

> It is undisputed that the defendant was advised of her rights under *Miranda* several times. The testimony shows that she stated she understood the warnings, and once stated she did not need a lawyer at that time. There is, however, no proof of a waiver of those rights other than the defendant's acknowledgement that she understood, or that she did not at that time want an attorney. There is a vast difference between merely understanding one's rights on the one hand, and voluntarily and knowingly waiving the protection afforded them on the other. *People* v. *Zimmer,* 68 Misc.2d 1067, 329 N.Y.S.2d 17, 21 (Co. Ct. 1972).

Not raised or considered below is the problem that communicating with a party known to be represented by counsel without the latter's prior consent violates Canon 7 of the A.B.A. Code of Professional Responsibility, Disciplinary Rule 7-104 (A)(1). Applying the canons, the court held in *United States* v. *Thomas,* 474 F.2d 110, 112 (10th Cir. 1973), that a statement obtained from a defendant who has counsel may not be offered in evidence unless the attorney is notified and afforded a "reasonable opportunity" to be present.

In denying petitioner's petition for rehearing, the Mississippi Supreme Court cited no law whatever but relied on factual assertions:

> After a careful search of the record, we find that nowhere in this record does Mrs. Biddy, the appellant, request, indicate, hint or express a desire to speak with or consult an attorney; although she was well aware that an attorney was available. Nowhere in any shape, form or fashion does she express a desire to have an attorney present during any questioning,

> nor does her husband express any wish or desire to have an attorney present. (Appendix B, p. 39)

The Court was wrong because the record does reflect that immediately upon arrival at the police station on December 27, 1970, petitioner's husband did request that petitioner not be questioned until her attorney arrived (Tr. 392). Nonetheless the Court's statements go to the heart of this Petition: will this Honorable Court permit courts to make the sophistical assertion that no attorney was requested, when in fact the petitioner's husband in her presence and on her behalf requested an attorney and then requested that questioning be delayed pending his arrival? The Mississippi Supreme Court's total reliance on a factual rationale for its decision prompts similar emphasis on the facts by petitioner. Accordingly pertinent data from the Statement of the Case will be highlighted here.

Petitioner was warned of her *Miranda* rights December 15, 1970, twelve days before her December 27 statement. By December 15, police had already focused their suspicions solely on petitioner, which suspicions had only deepened by the time of the obviously custodial interrogation in which the admissions were made. Accordingly it is undisputed that this is a case to which *Miranda* applies.

The detectives worked assiduously through Mr. Biddy's father and his business partner, Sims, and finally directly to induce Mr. Biddy to allow police unfettered access to petitioner.

It is undisputed that Mr. Biddy in the presence and on behalf of his wife asked Sims to call attorney Wright, as the detectives well knew. Upon arriving at the police station Mr. Biddy requested that petitioner not be questioned until the arrival of attorney Wright, who had prevented police from questioning her at home the night of December 16.

The detectives then systematically discredited petitioner in her husband's eyes, insinuating everything from insanity to adultery, until they rendered him in effect their agent in questioning petitioner.

Before petitioner made the directly incriminating admissions, her attorney, Wright, appeared at the station as her husband had requested. Though petitioner's husband entreated attorney Wright to stay, he informed both Mr. Biddy and the detectives that he was too sick to remain, but would send attorney Poole to replace him.

The Court below made much of petitioner's silence regarding an attorney. It seems clear first that she was in such an emotional state, partly engendered by her own husband's inquisitorial conduct, that she was unable to protect her interests, prompting her husband on her behalf at least to request counsel. Secondly, it appears that the police exploited Mr. Biddy's ambivalence towards petitioner, selecting him to go speak with Attorney Wright, while leaving the suspect petitioner in the interrogation room.

While petitioner's husband was absent speaking with attorney Wright, Lt. Reeves says he told petitioner he wished to question her, though he did not then do so. At no time before her admissions did Reeves advise her of her *Miranda* rights; he merely asked whether she understood her rights. Nor did she "waive" any rights; she merely indicated, according to Reeves, that she understood in her present state something she had heard twelve days ago (Tr. 335-336).

After attorney Wright left, and knowing but not mentioning that attorney Poole was on his way, Mr. Biddy and Lt. Reeves then secured petitioner's damaging admissions. Only Poole's arrival prevented Reeves from obtaining a signed statement. The kernel of this case is contained in Lt. Reeves' answer to a question of attorney Poole:

> Q. You got a full statement from her... between the time that Mr. Wright said he couldn't be [stay] there, and the time I was on my way [arrived]?
> A. Yes sir. (Tr. 323)

The same violation of *Miranda* and subversion of the right to the effective assistance of counsel occurred the next morning when, without a *Miranda* warning, and without mentioning to petitioner that her attorney was expected that morning, the detectives induced petitioner, in the absence of her attorney, to show them where she had placed Mona's body.

Just as they had labored to turn Mr. Biddy against his wife, the detectives now tried to make petitioner distrust her attorney, who, they assured her, obtained a forty-five year sentence for his last client; her prospects were equally gloomy since the attorney would rather watch a ballgame than speak with her. This is a literal mockery of *Miranda*. Should this Honorable Court decide that *Miranda* now needs no further explication, perhaps at least it could ensure that *Miranda* is in this case not flouted.

It was above noted that petitioner was unquestionably entitled to *Miranda* warnings. The question remains whether petitioner's December 15 waiver remained effective, or became stale, during the ensuing twelve days during which she was not in custody. *Miranda* v. *Arizona*, 384 U.S. 436, 474 (1966), does not mince words when there has been a request for counsel:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with an attorney and have him present during any subsequent questioning.

Here, after an attorney was requested, instead of the questioning ceasing, it was begun. This is clearly offensive to *Miranda, supra,* at 475, which makes abundantly clear that a waiver, to be effective, must be linked closely *in time* to any confession: "(a)n express statement that the individual is willing to make a statement and does not want an attorney *followed closely by a statement* could constitute a waiver." (Emphasis added).

In *Brown* v. *State,* 252 A.2d 272 (Md. 1969), the accused was interrogated and waived his *Miranda* rights one night and the next day was interrogated anew without a new warning. Holding the subsequent confession inadmissible, the Court stated that among the factors to be considered was whether the second interrogation was by "the same officer, or in the same place, or were close together in point of time . . ." Petitioner's case involves, not a one day but a twelve day hiatus, with no intervening interrogation.

The time periods tolerated have not even approached the instant twelve-day lapse. See *Maguire* v. *United States,* 396 F.2d 327 (9th Cir. 1968) (three days); *State* v. *Magee,* 245 A.2d 339 (N.J. 1968) (two and a half days). The general rule, therefore, seems to be that "[q]uestioning may be interrupted for brief periods without having to give warnings anew . . . as long as the delay is not long enough to convert the matter into a separate transaction entirely." George, Jr. *Defending Criminal Cases* (PLI, 1969), at 161. *Cf. Commonwealth* v. *Bennett,* 282 A.2d 276 (Pa. 1971); *State* v. *Davis,* 157 N.W.2d 907 (Iowa 1968) ("too remote in time"); *Commonwealth* v. *Hoss,* 283 A.2d 58 (Pa. 1971) (a "several hour" delay was tolerable since the accused was not moved and there was a "clear continuity" of interrogation). Whether earlier warnings are sufficient for a later interrogation can only be determined by a case-by-case inquiry. *People* v. *Bynum,* 483 P.2d 1193 (Cal. 1971). In *Nettles* v. *State,* 248 So.2d 259 (Fla. 1971), the Court

commented that if *Miranda* warnings are necessary, a warning given six days before a confession would *not* be sufficient. And, speaking broadly, the Court in *People* v. *Schenck,* 101 Cal. R. 75 (1972), stated that "where substantial intervals of time occur between the initial warning and the succeeding interrogation," a new warning may be required. Similarly, in *Franklin* v. *State,* 252 A.2d 487 (Md. 1969), the accused was warned of his rights on September 4 and interrogated on September 5 and 6 without renewed warnings. The Court held a confession made on the final day inadmissible: "proof showing only that the *Miranda* warnings were given on September 4 would fall short of compliance with the dictates of the *Miranda* decision." Even if Mrs. Biddy's waiver did not turn "stale," the *Miranda* warnings themselves lost effectiveness over the twelve-day interval between warning and final interrogation. Petitioner here urges that application of existing law would show that the delay between interrogations required new *Miranda* warnings.

But assuming *arguendo* that the December 15 waiver was still effective, did the December 27 requests for counsel withdraw the waiver?

That a waiver, once made, can be withdrawn at any time is hornbook law. *Stevens* v. *Marks,* 383 U.S. 234 (1965); 2 Han. Civ. Rts. – Civ. Lib. L.R. 144, 153 (1966); 42 *Notre Dame Lawyer* 479, 489.

> A valid waiver ceases to be effective whenever the accused indicates in any manner that he wishes to remain silent or that he wants an attorney.
>
> *Miranda* v. *Arizona, supra,* at 474.

When a lawyer is requested, any earlier waiver must be considered withdrawn. *Frazier* v. *U. S.,* 419 F.2d 1161

(D.C. Cir. 1969). Requesting an attorney must be regarded as a "change of mind" concerning the earlier waiver. *Cf. People* v. *Pervin,* 55 Cal.R. 847 (1967). Therefore, once an attorney has been called, all interrogation must cease, as if the defendant had explicitly reasserted his unwillingness to talk. *People* v. *Paulin,* 308 N.Y.S.2d 883, *aff'd,* 255 N.E.2d 164 (1969); *People* v. *Randall,* 464 P.2d 114 (Cal. 1970); *People* v. *Ireland,* 450 P.2d 580 (Cal. 1959) (here statement "call my parents for an attorney" held to be invocation of Fifth Amendment privileges). *Cf. Frazier* v. *Culp,* 394 U.S. 731, 738 (1969), and *State* v. *Magee, supra* (dictum);

> If at any time the suspect indicates 'in any manner' that he wishes to remain silent or that he wishes to consult with an attorney before speaking to police, there must be no further questioning, *even if an earlier waiver was validly obtained. Waiver of Rights in Police Interrogations,* 36 Chicago L.R. 413, 419 (1969) (Emphasis added).

In *Pierce* v. *State,* 451 S.W.2d 219 (Ark. 1970), the accused signed a waiver and then immediately called his attorney. The Court, holding the subsequent confession inadmissible, stated that "the accused has an unqualified right to stop the questioning at any stage and request that he be permitted to consult with an attorney." Similarly, in *United States* v. *Crisp,* 435 F.2d 354 (7th Cir. 1970), the accused signed a waiver of rights and then merely said that he didn't want to discuss the crime (a bank robbery). The Court held that later conversations—admittedly not concerned with that bank robbery—were inadmissible. The Fifth Circuit has held that:

> ... Where there is a request for an attorney prior to any questioning, as in this case, a finding of knowing

> and intelligent waiver of the right to an attorney is impossible.... If such a request is disregarded and the questioning proceeds, any statement taken thereafter cannot be a result of waiver but must be presumed a product of compulsion, subtle or otherwise.
>
> *United States* v. *Priest*, 409 F.2d 491, 493 (5th Cir. 1969)

Even apart from the question of waiver, courts since *Massiah* v. *U. S.*, 377 U.S. 210 (1964), have not favored interrogation in the absence of counsel once the police know that the accused has counsel. *Taylor* v. *Elliot*, 458 F.2d 979 (5th Cir. 1972); *People* v. *Gunner*, 257 N.Y.S.2d 924 (1965); *People* v. *Donovan*, 243 N.Y.S.2d 841 (1964); *Commonwealth* v. *McKenna*, 244 N.E.2d 560 (1969). See also, *United States* v. *Four Star*, 428 F.2d 1406 (9th Cir. 1970); *United States* v. *Smith*, 379 F.2d 628, 633 (7th Cir. 1967).[1]

In *U. S. ex rel. Magoon* v. *Reincki*, 416 F.2d 69 (2d Cir. 1969), the police knew only that an attorney had been contacted and that the accused was "awaiting (his) arrival." The Court struck down the confession obtained in the interim period. And similarly, in *People* v. *Vella*, 287 N.Y.S.2d 369 (1967), the accused was released after arraignment in one court and immediately apprehended and interrogated by police from another jurisdiction—without the presence or consent of the attorney appointed in the earlier arraignment. Furthermore, the accused apparently

[1] Of course this principle is applicable not only to petitioner's statement of December 27, but also to her drive with detectives to the reservoir on December 28 before attorney Poole's arrival. "Neglect to notify counsel of a planned interrogation is as effective in preventing consultation as the physical barrier which confronted Escobedo's attorney at the jail house door." *United States* v. *Wedra*, 343 F.Supp. 1183 (S.D.N.Y. 1972).

waived his *Miranda* rights during the interrogation. Nonetheless, the Court struck down the confession, holding that "[s]uch interrogation, despite the defendant's 'waiver' of his rights to counsel, was impermissible."

Clearly the police cannot interrogate the suspect while waiting for the attorney to arrive. In *Wakeman* v. *State*, 237 So.2d 61 (Fla. 1970), the defendant's attorney was called and he advised that he would immediately come to the police station. During the interim the defendant was questioned, advised of her rights, which she waived in writing, and induced to sign a confession. Then her attorney arrived. The Court held the confession inadmissible because obtained in derogation of defendant's Fifth and Sixth Amendments rights. See also, *Petree* v. *State*, 451 S.W.2d 461 (Ark. 1970); *State* v. *Harrison*, 251 N.E.2d 521 (Ohio 1969); *State* v. *Word*, 456 P.2d 210 (N.Mex. 1969).

It is a specious contention that petitioner did not have counsel because her husband requested counsel for her. In *People* v. *Arthur*, 22 N.Y.2d 325, 329 (1968), the defendant threw his child in the river. Attorney Stern, who had known the defendant for two years and had represented him in several matters, heard of this on the news and went unasked to the police station to see the defendant, because "he felt he had an obligation to the defendant." The next day in the absence of an attorney the defendant made incriminating statements which the Court ruled inadmissible because

> once the police know ... that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant the accused's right to counsel attaches; and this right is not dependent upon the existence of a formal retainer.

Nor is it significant that Mr. Stern did not, immedi-

> ately upon his arrival at Police Headquarters, instruct the police not to take any statements from the defendant.... Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel...

The Mississippi Supreme Court, however, even in following *Miranda,* has clearly expressed its reluctance to do so. *Brunson* v. *State,* 264 So.2nd 817 (1972). Perhaps this lack of sympathy with *Miranda* betrayed the Court into straying in this case from *Miranda's* precepts.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment and opinions of the Mississippi Supreme Court.

Respectfully submitted,

F. Lee Bailey
Mark J. Kadish
John R. Truman
One Center Plaza
Boston, Massachusetts
Tel. 617 - 723-1980

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 47,095
No. 47,100
MRS. CAROLEE BIDDY
v.
STATE OF MISSISSIPPI
[January 8, 1973]

ROBERTSON, *Justice:*

Mrs. Carolee Biddy was indicted by the Hinds County Circuit Court Grand Jury for the murder of her 6-year-old stepdaughter, Mona Biddy. A change of venue was granted to the Circuit Court of Jackson County, where appellant was tried for murder, but convicted of manslaughter by a Jackson County Petit Jury. She was sentenced to serve a term of 20 years in the State Penitentiary.

About 7:55 A.M. on December 3, 1970, appellant called the Jackson Police Department to report the disappearance of Mona Biddy, her mentally retarded stepdaughter. A massive search was conducted by the Jackson Police Department, law enforcement officers of Hinds and Rankin Counties, three or four hundred National Guardsmen, and many civilians and students.

On December 8th, five days after her reported disappearance, Mona's body was found by two fishermen in a cove on the Rankin County side of the Barnett Reservoir. Her body was at the water's edge and water from time to time would lap over it.

The first assignment of error was that the corpus delicti was not proven to the exclusion of every reasonable theory consistent with innocence.

The corpus delicti in a homicide case consists of two fundamental facts: (1) The fact of the death of the

deceased, and (2) The fact of the existence of a criminal agency as the cause of death. *Pitts* v. *State,* 43 Miss. 472 (1870). Both facts of the corpus delicti may be proved by circumstantial evidence. *Perkins* v. *State,* 160 Miss. 720, 135 So. 357 (1931).

On the afternoon of December 8, 1970, immediately after the body had been found, Dr. Forrest Bratley, a skilled and experienced pathologist, performed a complete autopsy on Mona's body at the University Medical Center in Jackson. His detailed written findings (a part of the record) ended with Dr. Bratley's positive opinion that the most probable cause of death was suffocation. The report also stated:

> "The complete postmortem examination does not reveal any natural cause of death nor is there any evidence of any traumatic injuries which could have caused death. The toxicological examination does not reveal the presence of any poison in the blood or stomach contents."

On June 24, 1971, Mona Biddy's body was exhumed, and a second autopsy performed by Dr. Forrest Bratley in conjunction with Dr. Donald Dore, Jr., the pathologist at the Singing River Hospital in Pascagoula, Mississippi. This autopsy was performed at Barrytown, Alabama, where the child had been buried.

This second autopsy was performed for the express purpose of determining whether Mona had swallowed any Liquid Plumr prior to her death. No signs or indications of any kind were found that the child had swallowed any caustic or corrosive substance. After a very detailed and thorough examination on the witness stand, Dr. Bratley stated that in his opinion death was caused by suffocation and that this suffocation was by external application of force by someone stronger than the child. Dr. Bratley never wavered in his opinion as to the cause of death, even

though he was extensively cross-examined as to other possible causes of death and the fact that findings of death by suffocation are similar to findings of death from heart disease, shock, laryngeal spasm, bronchial spasm, respiratory arrest and cardiac arrest. From his knowledge gained from personally performing the first and second autopsies, he clearly and decisively negatived any other cause of death. On the second autopsy, he and Dr. Donald Dore found no evidence whatsoever of Liquid Plumr or other caustic or corrosive substance in Mona's digestive tract or vital orgains. If Mona had had laryngeal spasm it would have had to have been caused by drinking Liquid Plumr or other caustic substance.

Dr. Howard Nichols, a skilled and experienced pediatrician of Jackson, who had been Mona's doctor for the first 1½ years of her life, after a detailed study of both autopsy reports testified that it was his considered opinion that the probable cause of death was suffocation due to external pressure over her nose and mouth. He further testified that it was his opinion that Liquid Plumr was not involved in Mona's death.

Dr. Arthur Hume, Associate Professor of Pharmacology and Toxicology at the University Medical Center and Toxicologist for the Mississippi Crime Laboratory, examined and tested blood samples, tissues of vital organs, gastric contents and other samples from Mona's body on December 9th, 1970, the day after her body was found, for poisons and drugs. Dr. Hume testified that he would consider Liquid Plumr a poison. He found no poison of any kind in her system. He did find a slight trace of dramamine, a stomach settler.

Dr. Milton Helpern, the chief medical examiner of the city of New York, after examining the autopsy reports, testified that he could not state with certainty the cause of death. He testified as to possible causes only.

Dr. Lucien L. Leape, a pediatric surgeon with the University of Kansas Medical School, who had made a special study of problems linked with lye ingestion by children, testified that he could not say what was the cause of death. He did testify that he had never heard of any child dying as a result of swallowing Liquid Plumr.

The testimony of all of these witnesses, and the exhibits introduced, were for the consideration of the trial jury. We feel that there was ample evidence in the record to prove the corpus delicti beyond a reasonable doubt and to the exclusion of every *reasonable* theory consistent with innocence.

The next assignment of error was that the two oral statements made by appellant were inadmissible under the fifth, sixth, and fourteenth amendments to the Constitution of the United States.

It must be remembered, in discussing this assignment of error, that the appellant and her husband, Ted L. Biddy, asked the Jackson Police Department for its help in locating their mentally retarded daughter. Every lead that the police would get was discussed and examined with the Biddys. The police were in constant touch with the Biddys and the Biddys with them. Both were apparently interested in what had happened to Mona Biddy.

It must also be kept in mind that, at the specific instance of the Biddys, the Jackson Police Department and its trained and skilled investigators and indeed the law enforcement officers of both Hinds and Rankin Counties and of the State of Mississippi, had expended a tremendous amount of time and effort and thought into solving the problem of what had happened to Mona.

On December 15, 1970, the police had found another item of clothing apparently worn by Mona at the time of her disappearance, so they contacted Mrs. Biddy, and she called

her husband. The end result was that Mr. and Mrs. Biddy came down to police headquarters.

Lieutenant Wesley L. Reeves, Jackson Police Department, who had been on the case from the beginning, in the presence of Lieutenant Price of the Jackson Police Department, and Thomas Zebert, County Attorney of Rankin County, asked Mrs. Biddy to go over once again the details of Mona's disappearance. Reeves testified that after she had done this:

"Then we told her we'd like to talk to her about it, and before we did, we would like to advise her of her rights.

"Q—All right. Now, who was in this conference room at this time?

"A—Lietenant Price, myself, and Mr. Zebert, Tom Zebert.

"Q—And you four were the only ones in there?

"A—Yes sir.

"Q—All right. Then, what did you do then?

"A—I told her that she did not have to talk to us; that she was entitled to an attorney, and what she did say could be used against her in court.

"In fact, I then told her that we had a list of her rights on a statement blank, and I would like for Lieutenant Price to read them to her, so she would understand it.

"Lieutenant Price did read this statement of her rights, one at a time, and then I asked her if she understood each, and she said she did. Mr. Zebert asked her if she understood them, and she said she did.

"We asked her what education she had, and she said she was a high school graduate. We were convinced that she understood her rights.

"Q—Did she tell you where she had been employed previously?

"A—Yes sir. She had been employed as a secretary for Michael Baker, an engineering firm.

"Q—What kind of spirit was she in at this time?

"A—She was very cooperative. She seemed to be in good spirits."

At this time she signed a written waiver, which set forth her rights in detail. Reeves, Price and Zebert then signed as witnesses to her signature. She denied any involvement in Mona's disappearance.

Later on December 15th Mrs. Biddy and her husband went in their car to Highway Patrol Headquarters. Her rights were again explained to her and she signed a second detailed waiver.

On the night of December 16th, Lieutenant Reeves, while off-duty and at his home, received a telephone call from the Biddys reporting that appellant had been attacked and stabbed. The Biddys wanted him to come to their home, so he called Lieutenant Price and they went to the Biddy home. Mrs. Biddy told them about the attack and how she had gotten away from her assailant. She had a superficial cut on her hip.

Late at night on December 26, 1970, Lt. Reeves received another telephone call from the Biddy home. It was reported to him that 2 1/2-year-old Candice Biddy had been kidnapped. It was a very cold night and Lt. Reeves went immediately to the Biddy home. Mrs. Biddy stated that someone came in the window, came by Mr. Biddy who was asleep in the den, got Candice, and went back out the window, tying up the family dog and putting him into the closet. Mr. Biddy found Candice, scantily clad, near a ditch in the Biddy backyard. Lt. Reeves checked the window that Mrs. Biddy had pointed out and found dust on the window-sill that had not been disturbed.

Lt. Reeves was advised by Mr. and Mrs. Biddy that they were going to Georgia on the next day, December 27th, to

visit Mr. Biddy's parents. Early on the morning of December 27th Lts. Reeves and Price went back to the Biddy home, looked around the backyard and the ditch but could find no evidence that someone had kidnapped Candice.

Being advised that the Biddys were ready to leave town and that Mr. Biddy would like to talk to them, the Biddys followed Reeves and Price back to police headquarters in their own car.

Out of the presence of Mrs. Biddy, Reeves and Price told Mr. Biddy that they had found that Mrs. Biddy had not modeled clothes for a local clothing store and received clothes for her services, as both Mrs. Biddy and Mr. Biddy had told them. They also told Mr. Biddy that Mrs. Biddy had not gone to a health studio once a week, as she had told them. Reeves and Price also told Mr. Biddy that their investigation of the assault and stabbing of Mrs. Biddy had convinced them that it did not happen. Mr. Biddy agreed with them. They also informed Mr. Biddy that Candice Biddy had not been kidnapped as Mrs. Biddy reported. Biddy agreed with them on this and asked to talk to his wife.

Before they had a chance to talk very much, Reeves was advised that Mr. Biddy's partner, Mal Sims, was downstairs and wanted to see Biddy. While Wright and Biddy were talking, Reeves and Price told Mrs. Biddy that they would like to ask her some questions, and before asking her any questions Lieutenant Reeves said:

> "[D]o you understand your rights? You have been advised of your rights before.' and she said, yes, she understood them.
>
> "At that time, Mr. Biddy and Mr. Wright came back. Mr. Biddy came into the room, Mr. Wright stood at the door. He had told me previously that he was ill, and would have to go home. So, he left.

"Q—Was Mrs. Biddy aware of the fact that Mr. Wright was there?

"A—He came to the door, and the door was open. She was sitting right by the door. They did not talk, but he talked to Mr. Biddy.

"Q—And did Mr. Biddy come in and talk to Mrs. Biddy?

"A—Yes sir.

"Q—All right. Tell we what happened.

"A—At that time, Mr. Biddy began to talk to Mrs. Biddy, and asking her about these different instances, about the clothing store, about the health studio, about the stabbing and the kidnapping.

"She admitted that she had not worked for the clothing store, and she partially admitted not having gone to the health studio as regularly as she had claimed to be going.

"She admitted that she had faked the stabbing, and had faked the kidnapping.

"At this time, Mr. Biddy became very emotionally upset, and —

"Q—What about the appearance of the defendant, Mrs. Carolee Biddy? How was she at this time?

"A—She was a little emotional, not very much, at that time. She seemed like she wanted to tell him something.

"At that time I told her 'Mrs. Biddy, now is a good time to tell Mr. Biddy if you were involved in the disappearance of Mona'. I told her that Mona was gone, she wouldn't — couldn't come back, and that she was afflicted, that the doctors had told us she would never get any better, and that now would be a good time to talk to her husband.

"They were sitting facing each other holding hands. She looked straight at Mr. Biddy, and said, 'Ted, I am

sorry I did it.' She said 'Ted, I didn't mean to do it.' And she broke down. She stopped what she was going to say.

Mrs. Biddy then continued her story of what happened the night of December 2nd. Mona had gotten hold of some Liquid Plumr at about 7:30 P.M., had drunk some of it, that it made her violently ill and she vomited. Mrs. Biddy tried to feed her but Mona could not eat. Mrs. Biddy called Dr. Howard Nichols, her pediatrician, and Dr. Nichols advised her to examine Mona's mouth and if her mouth was burned on the inside to call him back. If Mona's mouth was not burned, she was all right and just give her something to settle her stomach. Mrs. Biddy put Mona to bed around 8:30 P.M. Mrs. Biddy went by Mona's bed about 10:30 P.M. and found her "scooted down the bed" with the bed clothing wrapped around her head. Lt. Reeves continued:

"She said she unwrapped the bed clothing and couldn't get any response from Mona. She said this frightened her, and she picked Mona up and took her out to the den, and laid her down on the couch. She said she just flopped down.

"She said she started to call Ted, but she was afraid that people would think that she had something to do with it; that she had realized she was dead, and she was afraid to call Ted, she said.

"She started to call a doctor, and she just decided to get rid of the body, and take the body so they wouldn't blame her with it. She carried her out and put her in her car and drove to the reservoir.

"She drove to a particular spot near the Lakeview Marina, because she and Ted had spent a lot of time out there in the past. She said she put the body down near the bank, kissed it on the forehead, and left it

there so it would be found, and then she came back home."

We think that this testimony was properly admitted. It is perfectly clear to us that Mrs. Biddy thoroughly understood her rights and that she had intelligently waived them, not once but twice in writing, and also several times orally. Even on December 27th, immediately before her statements she acknowledged that she understood her rights. There are no magic words that law officers must meticulously repeat each time they question a person. This conclusion was also reached in *Maguire* v. *United States*, 396 F.2d 327 (9th Cir. 1968); *Sossamon* v. *State*, 432 S.W.2d 469 (Ark. 1968); *People* v. *Hill*, 58 Cal. Rptr. 340, 426 P.2d 908 (1967); *State* v. *Graves*, 259 La. 526, 250 So.2d 727 (1971); *State* v. *Rowe*, 468 P.2d 1000 (Wash. 1970).

Appellant next contends that the court erred in granting an instruction advising the jury that should they convict appellant of manslaughter, the court might sentence appellant to the penitentiary for a term not to exceed twenty years.

This is the instruction complained of:

"The Court instructs the Jury for the State of Mississippi that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, Carolee Biddy, is guilty of manslaughter, you should certify to the Court the following verdict, to-wit:

We the Jury, find the Defendant guilty of manslaughter.

Whereupon the Court might sentence the Defendant to serve a term of years in the penitentiary, not to exceed 20 years."

This same contention was made long ago in *Stevenson* v. *State*, 136 Miss. 22, 100 So. 525 (1924). The Court in *Stevenson* answered this argument in this way:

"In the case now before us the instruction informed the jury that in case of a conviction of manslaughter the court might sentence the defendant to serve a term of years in the penitentiary, not to exceed twenty years. We do not think that this instruction can properly be said to be an invitation or inducement to the jury to compromise on the lesser offense, and, if this instruction was error at all, it was not prejudicial to the rights of the appellant and will not justify a reversal under the facts of this record." 136 Miss. at 29-30, 100 So. at 526.

In *Blalock* v. *State,* 148 Miss. 1, 113 So. 627 (1927), in ruling on a similar manslaughter instruction, the Court had this to say:

"In the case before us, the instruction on the punishment for manslaughter does not call the jury's attention to the minimum punishment, and does not, by inference, lead the jury to believe that, if so convicted, a light punishment will be inflicted. We think this distinction important between the Ellerbe case and this one. It is one thing to hold out the definition of a minimum punishment, and another to tell the jury of a maximum punishment. It was, in our opinion, the singling out, in the Filerbe case, the minimum features of punishment of manslaughter, that produced the reversal therein. It is difficult to see how it prejudices the right of a person being tried for a crime for the jury to know what the punishment is that may follow a conviction for that crime. It is true that the court administers the punishment, except in capital cases, and some others not here involved, and that the jury should not be told anything in reference to what that punishment will be; but we fail to see how the present instruction prejudiced the defendant's rights. It certainly did not lead the jury to believe he would be

dealth with leniently. The maximum was stated, and the minimum was left out.

"In so far as the effect on the jury is concerned, we cannot see it had any harmful effect upon his rights. Anything less than twenty years for manslaughter is in the discretion of the court, and it does in no wise prejudice the defendant's rights for the jury to know what the maximum would be. At least, we think it is apparent that his rights were not so prejudiced as to cause the court to reverse a judgment therefor. *Stevenson* v. *State,* 136 Miss. 22, 100 So. 525. We hold, therefore, that there is no reversible error in this objection to the instruction." 148 Miss. at 5, 113 So. at 628.

The final assignment of error was that the trial court erred in overruling the motion to vacate the judgment because the jury verdict was returned on Sunday and the trial judge sentenced the appellant on Sunday.

The five-day trial was concluded on Friday, September 3, 1971, and the jury on that day, with the exhibits and written instructions of the Court, retired to the jury room to consider what verdict they should return. They were unable to reach a verdict and they resumed their deliberations on Saturday, September 4th. Still being unable to reach a verdict, they resumed their deliberations about 9:30 A.M., Sunday, September 5th, and about 2:30 P.M., they returned their verdict in open court. Monday, September 6, 1971, would be Labor Day. So, the Court inquired of Counsel for the Defendant whether they desired that sentence be deferred until a later date. Counsel for the Defendant responded that they did not so desire. Whereupon, the Court sentenced the Defendant to twenty (20) years in the State Penitentiary.

In *Burrage* v. *State,* 101 Miss. 598, 58 So. 217 (1912), a murder prosecution was concluded on Saturday night, and

the jury returned its verdict into court at 12:06 A.M. Sunday morning. In that case, it was contended that the verdict and judgment were null and void because rendered on Sunday. This Court affirmed the conviction and sentence, stating:

> "It is true that we have no statute providing that verdicts may be received on Sunday, and it may be that a judgment rendered on Sunday is void, but 'in regard to the delivery and reception of verdicts a different rule applies, as the rendering of a verdict is a mere ministerial act, and it is an act of necessity and charity to receive it and not keep the jurors confined until Monday.' " 101 Miss. at 606-607, 58 So. at 219.

In *State* v. *Foss,* 158 La. 471, 104 So. 211 (1925), trial was begun on Friday and the taking of evidence was concluded on Saturday night at 11:20. Counsel for defendant stated to the court that he was eager to continue the trial. Whereupon, the prosecutor objected on the ground that if the trial proceeded and resulted in conviction that the continuation of the proceeding on Sunday might be urged as a ground for a new trial. Defense counsel gave his word that if the case were allowed to proceed no advantage would be taken of the fact that some of the proceedings had been held on Sunday. The case proceeded, with argument of counsel ending at 12:25 A.M. Sunday, at which time the jury was charged and the verdict was returned and recorded at 2:00 A.M., Sunday.

Appellate defense counsel (not the trial defense counsel) urged that these Sunday proceedings were void. In *Foss,* the Supreme Court of Louisiana held:

> "An accused has no right to stand by and suffer proceedings to take place on a 'statutory holiday,' and after verdict, in a motion to quash, ask to have the proceedings reversed on the ground that it was a holiday.

"The objection should not have been postponed until after verdict, nor urged for the first time in motion in arrest.

"Moreover, the proceedings on a statutory legal holiday are not necessarily null. They may be held on that day by consent. Besides, an accused may be concluded by his silence, if he chooses to remain silent when he is represented by counsel amply able to protect his rights.

. . . . . .

"[A]n accused may waive his constitutional, statutory, or common-law rights, except when forbidden by some superior counter principle of law deemed necessary for his protection.

"There is no constitutional, statutory, or common-law principle which forbids an accused party from consenting to have his case argued, submitted, and determined by the jury and court on Sunday or a statutory legal holiday. . . .

. . . . . .

"*There is who question of the waiver of jurisdiction in this case. The court and the jury were legally constituted, and were competent to try the issue of guilt or innocence between the state and the accused.* The only question was whether the case should proceed to its conclusion on Sunday or be postponed to a future day.

"*Whether a trial shall take place on one day rather than another can in no sense be said to affect the jurisdiction and competence of the court.*

"The objection is purely technical and dilatory in its nature. If it had been made at the proper time, the case would have been delayed to another day, with the same result. The defendant has suffered no detriment caused by the continuance of the trial on Sunday.

"An accused party at whose instance and on whose persuasive promise a case has been continued and concluded on Sunday, and who took the chances of an acquittal, should not be permitted, after verdict of conviction, to challenge the regularity and legality of such proceedings.

"To ignore his request and promise to the court and district attorney whereby he gained a speedy determination of his case, and to set aside the verdict on the ground urged, would be a palpable miscarriage of justice, destroy the sanctity of the court, and make a mockery of judicial procedure.

"*Our conclusion is that the prohibition of the continuance of the trial on Sunday of a case already begun does not affect the jurisdiction and competence of the court, and is not such as cannot be waived by an accused party.*" 158 La. at 475-478, 104 So. at 212-214. (Emphases added).

The judgment of the Circuit Court is affirmed.

AFFIRMED.

GILLESPIE, C.J., and PATERSON, INZER and BROOM, J.J., CONCUR.

APPENDIX B

IN THE SUPREME COURT OF MISSISSIPPI

No. 47,095
No. 47,100
MRS. CAROLEE BIDDY
v.
STATE OF MISSISSIPPI
[February 26, 1973]

INZER, *Justice:*

ON PETITION FOR REHEARING

The only assignment of error in the Petition for Rehearing is:

THE COURT DID NOT FULLY CONSIDER THE ADMISSIBILITY OF THE STATEMENT OF APPELLANT.

In her brief in support of her Petition for Rehearing, appellant quotes from *Miranda* v. *Arizona*, 384 U.S. 436, 444, 445, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 707 (1966):

> *If, however, he indicates in any manner and at any stage of the process that he wishes to consult an attorney before speaking there can be no questioning . . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with an attorney and have him present during any subsequent questioning.* (Emphasis added).

In our original opinion, we discussed at length the two occasions on December 15, 1970, when appellant's *Miranda* rights were explained orally in detail, and when she signed two written waivers setting forth her rights in detail. We quoted the testimony of Lt. Reeves wherein he testified that on December 27, 1970, he again asked

Mrs. Biddy if she understood her rights, and she replied that she understood them.

After a careful search of the record, we find that nowhere in this record does Mrs. Biddy, the appellant, request, indicate, hint or express a desire to speak with or consult an attorney; although she was well aware that an attorney was available. Nowhere in any shape, form or fashion does she express a desire to have an attorney present during any questioning, nor does her husband express any wish or desire to have an attorney present.

All statements that Mrs. Biddy made on December 27, 1970, were made freely and voluntarily and mostly on the solicitation of her husband.

Ted L. Biddy, the husband of appellant Carolee Biddy, testified for the defense on direct examination as follows:

> Q. Then, if you remember, what did you say to Carolee or Detective Price or Reeves?
>
> A. Well, I was up real close to her, I had her hands in mine, I was right up next to her. I told her, I says, "Honey, I've got something very serious to say to you now. They have told me that they have found no evidence that you were attacked that night, nor that Candace was abducted last night and they believe that you staged these as hoaxes."
>
> Q. Go right ahead.
>
> A. Well, she admitted that they were true by shaking her head affirmatively that she had. She was emotional, of course, during this. I then told her that there was something else that they had told me that I wanted to tell her and that was that they had told me that they had three witnesses who had seen a woman, fitting her discription, walking around in a rose nightgown at the Main Harbor Marina on the night Mona disappeared.
>
> Q. What did Carolee go on and say, what was her story?

A. Well, Lieutenant Reeves and Lieutenant Price started talking to her and asking her about it and she says, "Well, I said I did not go in to check on Mona before I went to bed but I did." She said that she had watched some TV program and had dozed off, it was 10:30 or 11:00 o'clock, and that she went in to check on her before going to bed and she couldn't see Mona in the bed. She said all she could see was a big fluffy pillow and she went over to get her out from under the covers; it was nothing unusual for Mona, she was a hyperactive child, and she would be a lot of times under the cover. No one could sleep with Mona because she was so hyperactive. She said that she went to get her out from under the covers and pull her up in the bed, straighten her up, and the covers were all twisted around her and that when she raised the covers up that it pulled Mona up with it and when the covers came off she fell back and she knew immediately something was wrong. She said she picked her up on her shoulder and took her into the den, laid her down on the couch with her head in her lap and checked her in every possible way, her breathing, her pulse, shaking her and finally realized that she was dead.

Q. What did she then tell the policeman that she did?

A. She said that she panicked. She said she could just see my ex-wife Ruth's face; that she knew she would be blamed. She said she started to come get me. She started to call the doctor but she could just see my ex-wife's face and that she panicked. And that she picked her up, put her in the front seat of our car; she said she drove and didn't know where she was going but the next thing she remembers she was on the reservoir levee road and that she went to the

area of the Lake View Marina, took her body out of the car, took her over to the edge of the bank on a grassy spot, laid her down, kissed her and drove back home. She said she couldn't remember anything about driving back home except that the car almost went out of control one time.

In summary, it is apparent from the record in this case that all of the constitutional rights of Mrs. Biddy had been fully explained to her, she fully understood them, and with this knowledge, she freely and voluntarily made the statements complained of, mostly at the solicitation of her husband. It is not contended that she was in any way coerced, threatened or made any promises by the officers. She never at any time expressed any desire to speak with or consult with the attorney with whom her husband conferred. Neither did she express any desire to consult with any other attorney or have an attorney present before she made any statement. A statement made under these circumstances certainly should be and is admissible in evidence.

For the reasons stated the petition for rehearing is denied.

All Justices Concur.

APPENDIX C

Petitioner's Statement of December 27, 1970

They were sitting facing each other, holding hands. She looked straight at Mr. Biddy, and said "Ted, I am sorry I did it." She said "Ted, I didn't mean to do it." And she broke down. She stopped what she was going to say.

Then she continued and went through the story about what she said had taken place. She said that on this particular night, December the 2nd, Mona had gotten ahold of Liquid Plumr, at about seven:thirty, and drank some out in the storeroom, and it made her violently ill. It made her vomit.

She tried to feed her, and she couldn't eat. She called the doctor and asked him what to do, and he said that if her mouth was not burned, and turning kind of white, that she was not seriously hurt, and to give her something to settle her stomach.

She said then Mona went to bed at about eight:thirty. She went to bed in the room with Lee Ann, which is Mrs. Biddy's daughter, and Mr. Biddy's stepdaughter. Usually one of the little boys sleeps in this room, but for some reason they changed, and Lee Ann was to occupy the room with Mona.

She said that Mr. Biddy went to bed shortly after that, and she stayed up and watched television with her son Rocky, who is ten or eleven years old. He was studying, and she was watching T. V.

Around ten, I believe, Rocky went to bed, and at ten: thirty, she said, she started to go to bed, and she said she went by Mona's room to look in on her. She said she found her — she said 'scooted down the bed', with the bed clothing wrapped around her head.

She said she unwrapped the bed clothing and couldn't

get any response from Mona. She said this frightened her, and she picked Mona up and took her out to the den, and laid her down on the couch. She said she just flopped down.

She said she started to call Ted, but she was afraid that people would think that she had something to do with it; that she had realized she was dead, and she was afraid to call Ted, she said.

She started to call a doctor, and she just decided to get rid of the body, and take the body so they wouldn't blame her with it. She carried her out and put her in her car and drove to the reservoir.

She drove to a particular spot near the Lakeview Marina, because she and Ted had spent a lot of time out there in the past. She said she put the body down near the bank, kissed it on the forehead, and left it there so it would be found, and then she came back home.

She said the next day, the next morning, she got up and fixed breakfast. She asked her children to wake up everybody. She said one of the boys — I'm not sure which one — Jimmy, I believe, went into the room — in fact I know it was Jimmy.

He went into the room, because that's where he usually slept, to get his clothing, and he told her that Mona was not in the room, and at that time, she said, she looked and saw the door to the carport partly open from the kitchen to the carport, or the den, and she notified Ted, and they began an immediate search for Mona.

That's the story she told us at that time.

. . . .

Q. Let me first ask you one other question: Who was present during the time she was talking to you?

A. Lieutenant Price, myself, and Mr. Biddy.

(May 26, 1970 evidentiary hearing, Tr. 292-294).